

DEPARTMENT OF STATE

THE LEGAL ADVISER

October 9, 1953

TO: L - Mr. Phleger

Mr. Ben Bruce Blakeney, representing Americans practicing the professions in Japan to come in to see you on Monday, October 12, at 3 P.M. Mr. Blakeney wishes the Department to inform the Japanese Government that the Department considers that the US-Japanese FCN Treaty grants to Japanese citizens the right to practice the professions, including the law, in the District of Columbia and other territories under Federal, as distinguished from State jurisdictions.

For the reasons stated in the attached memorandum (to which is attached his brief and an Embassy despatch) I recommend that Mr. Blakeney be informed that we cannot do so.

Attachments.

Stanley D. Metzger

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DEPARTMENT OF STATE

THE LEGAL ADVISER

October 9, 1953

MEMORANDUM

TO: L - Mr. Phleger

FROM: L/E - Mr. Metzger

SUBJECT: Whether Japanese citizens are given the right to practice the professions, including the law, in the District of Columbia and other territories under Federal jurisdiction under the US-Japan Treaty of Friendship, Commerce and Navigation

As you know, Article VIII, paragraph 2, of the US-Japan FCN Treaty provided that nationals of either party "shall not be barred from practicing the professions within the territories of the other party, merely by reason of their alienage." In advising and consenting to the ratification of the Treaty, the Senate attached the following reservation:

"Article VIII, paragraph 2, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said Treaty shall apply to such professions."

The Japanese Government agreed thereto, and on its part ratified the Treaty, subject to a parallel reservation in the following language:

"Japan reserves the right to impose prohibitions or restrictions on nationals of the United States of America with respect to practicing the professions referred to in Article VIII, paragraph 2, to the same extent as States, Territories or possessions of the United States of America, including the District of Columbia, to which such nationals belong impose prohibitions or restrictions on nationals of Japan with respect to practicing such professions."

Mr. Blakeney

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Mr. Blakeney contends that "state-licensed" means "State-licensed" with a capital "S"; since that is so, the reservation does not cut down the right granted in Article VIII, Section 2, to practice professions regardless of alienage in the District of Columbia or other Federal territories; and that consequently, Article VIII, paragraph 2 overrides any inconsistent D. C. or territorial law restricting practice on the basis of alienage. He wishes us to adopt this interpretation and inform the Japanese Government accordingly.

In my opinion, we cannot do so because, as the negotiating history of the Japanese Treaty shows, both the United States and Japan did not so interpret the term "state-licensed". Rather, it was and is understood by both countries to mean "licensed by any political entity."

1. In the discussions with the Japanese with respect to the exchange of notes answering the Senate reservation on professions, this precise point was raised. The original Japanese draft of their note, accepting the United States reservation, stated:

"Japan reserves the right to impose prohibitions on restrictions on nationals of the United States of America with respect to practicing the professions referred to in Article VIII, paragraph 2, to the same extent as states of the United States of America to which such nationals belong, impose prohibitions or restrictions on nationals of Japan with respect to practicing such professions." (Embassy Tokyo Telegram 439, August 17, 1953).

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In its Telegram 438, August 16, 1953, Embassy Tokyo commented on the Japanese note in this respect, stating that the Foreign Office had

"raised the question as to whether the United States reservation was applicable to the United States Territories (Hawaii and Alaska), possessions and District of Columbia. If so, Japanese reservation would be amended accordingly. The Embassy's reply, subject to United States approval, was that the reservation was not applicable to such areas under federal jurisdiction, since Senate reservation applicable only to states. Thus professions clause would supersede any territorial restriction limiting professions to citizens, and if US nationals, regardless of domicile, can secure professional license in Alaska, Hawaii or District of Columbia, they would be eligible practice in Japan regardless of alienage. Request confirmation this point."

The Department, however, specifically disapproved the Embassy's explanation. In the Department's Telegram 419, August 18, 1953 to Embassy, Tokyo, the Department stated:

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"Suggest word 'states' in Japanese reservation read 'States or Territories' consistently with Protocol 4. Embassy explanation point C (2) Telegram 438 erroneous. Adjective 'state' in U. S. reservation is lower case and used in generic sense to cover whatever political entity has jurisdiction in premises, including Territories." (Under-scoring added).

Subsequent to the Department's telegram stating that "state-licensed" means "licensed by any political entity", the Japanese draft note was amended to its present form, in which Japan reserves the right to restrict the practice of professions to the same extent as "States, Territories or possessions of the United States of America, including the District of Columbia," imposed prohibitions on Japanese nationals. Embassy Tokyo Telegram 493 of August 24, 1953 reported that the Japanese had been reluctant to omit the words "possessions" and "District of Columbia" from their reservation, and justified inclusion of those words "on basis clarity and to avoid possible ambiguity". The Embassy further stated that it had not been called upon to explain to the Foreign Office the Department's position that "state" includes territory, because it is in lower case and is used in generic sense. Apparently the Japanese fully appreciated the significance of the Department's suggestion that the word "territories" be included, since the Embassy stated in the same telegram that "Japanese readily concurred United States' view, presumably because they wished plug apparent loop-hole in United States' reservation which could benefit United States' nationals in Japan".

Consequently, it seems clear from the negotiating history that both the United States and Japan understood that "state-licensed" meant "licensed by any political entity", and not "licensed by a state". Accordingly, for the Department to adopt and communicate to the Japanese Government the interpretation desired by Mr. Blakeney would reverse the existing understanding of both Governments on the matter.

2. The Department's position expressed in its Telegram No. 419 to Embassy Tokyo was based upon its understanding of the US-Danish FON Treaty, from which the form of the Senate reservation on the practice of professions in the Treaty was lifted. The use of the term "state-licensed" was understood by both the Danish and United States negotiators to refer to licensing by any political entity. The Department originally proposed to the Danes a paragraph on professions providing for national treatment. The Danes, however, were unable to accept this without considerable amendment, and pointed out that they needed a written understanding which would make inapplicable such treatment to those professional activities in Denmark "which by the below mentioned Danish legal provisions are reserved for Danish citizens"; there followed a listing of a number of national Danish Acts, limiting to the Danish citizens a series of professional activities. When the

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Department indicated that it would rather see general language to exclude such categories of professions, the Danes came forward with the "state-licensed" provision, and asked what professions in the United States would be included under such language. The Department replied that it could not foretell with accuracy. It added:

"Many professions and occupations are state-licensed and reserved to citizens under State legislation; but the pattern of alien disability is quite uneven. Some states are much more inclined to restrict than are others; and one state does not pick the same object to restrict as does another. A list compiled in 1946 (and which tends to enlarge with the passage of time) showed a total of 70 different professions and occupations reserved to citizens (including, sometimes, declarants) in one or more States and the District of Columbia ... "

Thus, from the outset, the United States did not distinguish "states" from the District of Columbia or Territories in this respect.

It was clearly in the interest of the United States not to make such a distinction, since the Danish Acts reserving to citizens the right to practice a number of professions are national statutes affecting all areas of Denmark. Consequently, if the United States had taken the position that "state-licensed" meant "licensed by a State", Danish citizens would have been granted rights under the Treaty which the United States would not be securing for American citizens.

3. It is possible, of course, that a test case in District of Columbia courts might, on the bare public record, go the other way, especially if the District Court did not make inquiry of the Department in construing the reservation. On the existing records as outlined above, however, it is recommended that Mr. Elakeney be informed that the United States cannot notify the Japanese Government as he desires.

Attachments.

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